Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

1996-97 TERM

JOHN B. WELLS,

Petitioner-Appellant

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the petitioner possessed a sufficient property interest in his veterans loan guaranty entitlement sufficient to require notice of an action that prevents their restoration.

II. Whether the petitioner possessed an equity of redemption under Ohio law in property assumed by a third person.

III. Whether Congress intended in 38 U.S.C. 3702(b) to allow the Secretary to withhold the restoration of benefits arising out of a deed in lieu of foreclosure.

IV. Whether the Soldier's and Sailor's Relief Act precluded the Secretary from taking administrative action such as acceptance of a deed in lieu of foreclosure to the detriment of petitioner, his assigns, his property or his equity of redemption while petitioner was on active duty.

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BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Federal Circuit was entered on June 6, 1997. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

United States Constitution - Amendment V.

28 U.S.C. § 1254

38 U.S.C. § 3702(b)

38 U.S.C. § 3703

38 U.S.C. § 3710

38 U.S.C. Sec. 3732

38 U.S.C. § 7252(a)

38 USC Sec. 7261

50 U.S.C. Appx. § 525

The pertinent text of the above citations are set out in the appendix.

STATEMENT OF THE CASE

Petitioner John B. Wells, appears *pro se* before this Court. This case arose out of a timely notice of disagreement filed with the Cleveland Veterans Affairs Regional Office concerning property purchased by the petitioner in 1978 and assumed by third parties in 1979. The assignees defaulted in 1981 and without notice to petitioner, the Department of Veterans Affairs accepted a deed in lieu of foreclosure and froze that portion of petitioner's loan guaranty benefits that had been used to finance the property. In 1989 petitioner first became aware of the default and the unilateral action taken by the VA. He appealed to the Cleveland VA Office who rejected his claim and eventually prepared a statement of the case. The board of Veterans Appeals ruled against the petitioner in an opinion entered January 31, 1995. The matter was timely appealed to the Court of Veterans Appeals pursuant to 38 U.S.C. § 3752(a) who affirmed the BVA in a

decision rendered on August 7, 1996. *See, Wells v. Brown*, 9 Vet.App. 293 (1996). The matter was appealed to the Court of Appeals for the Federal Circuit under the provisions of 38 U.S.C. § 7252 which affirmed the Court of Veterans Appeals in a decision entered 6 June 1997. *Wells v. Brown*, 114 F.3d 1207, (1997), 1997 WL 311559 (Fed.Cir.).

ARGUMENT

I. The petitioner possessed a sufficient property interest in his veterans loan guaranty entitlement sufficient to require notice of an action that prevents their restoration.

The standard for determination as to whether a property interest exists is found in *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Board of Regents v. Roth*, 408 U.S. 564 (1972). In keeping with *Roth*, there must be more than a "unilateral expectation" to the benefit. The petitioner must have legitimate claim of entitlement to the benefit. *Id* at 577. A constitutionally protected property interests has been found in a right to continued government benefits such as welfare

benefits, *Goldberg supra.* continuation on active duty in the military, *May v. Gray*, 705 F.Supp. 716 (E.D.N.C. 1988), and in veterans benefits, *Walters v. Nat. Assn of Radiation Survivors*, 473 U.S. 305, 368 (1985).

By allowing a third party to assume his loan, petitioner did not transfer or abandon his benefits. He merely loaned them to another party, safe in the expectation that they would be returned to him at the conclusion of the loan period (thirty years) or when the third parties sold the property. Accordingly, he possessed a legitimate claim of entitlement to his benefits. Absent some governmental intrusion and action, such as foreclosure or in this case acceptance of a deed in lieu of foreclosure, the rights would have been released for his use. This constitutes more than a mere expectation. It was an unqualified right. As the *Roth* court found, "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in

their daily lives, reliance that must not be arbitrarily undermined. *Roth*, 408 U.S. 564, 577 (1972).

Ohio has long recognized the rights of the mortgagor as a surety for the assuming transferee. *Walser v. Farmer's Trust Company of Indianapolis.*, 185 N.E. 535, 538 (1933). As a surety or guarantor, petitioner had the right to contribution and reimbursement from the assuming transferee. *Gholson v. Savin*, 31 N.E. 2d 858, 861 (1941). In other words, the appellant had the right to pay the outstanding obligation and seek reimbursement. Here, by the time the appellant had discovered the default, his rights to reimbursement, indemnification and contribution were time barred.

Once a property right has been found, the government cannot deprive the petitioner of that right without notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950); *Mennonite Board of Missions v. Adams*, 462

U.S. 791 (1983). In a class action dealing with foreclosures, which are analogous to the instant case, the Eighth Circuit held that the VA must provide notice in cases where class members defaulted or where a third person assumed the loan and then defaulted. *Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991) *amended by* 956 F.2d 812 (8th Cir. 1992). In reliance upon *Fuentes v Shevin*, 407 U.S. at 67, 86-87 (1972), the Eleventh Circuit had found that a property interest can arise in a right less than full legal title, irrespective of whether they come from contract or state law. *Federal Deposit Insurance Corporation v Morrison*, 747 F.2d 610, 614 (11th Cir. 1984). Accordingly, petitioner through his suretyship rights and his equity of redemption (discussed *infra*) had sufficient rights to constitute a constitutionally protected property interest.

In finding that petitioner had no property interest, the Federal Circuit conflicted with the Eight and the Eleventh Circuits. Accordingly a review under Rule 10(a) is

warranted. Additionally, the Federal Circuit has conflicted with this Court's rulings to the extent that review is proper under Rule 10(c). If this Court does not grant the petition for a writ of certiorari, there will be confusion on a subject that goes to the heart of constitutional due process and fair play.

II. The petitioner possessed an equity of redemption under Ohio law in property assumed by a third person.

In Ohio, a mortgagor has an absolute right to redeem his property. *Hausman v. City of Dayton*, 653 N.E.2d 1190 (1995). The issue of whether petitioner maintains his equity of redemption turned on whether or not he was the mortgagor. Both the Federal Circuit and the Court of Veterans Appeals found and the government argues that he divested himself of that title when he allowed a third party to assume the mortgage. Both relied upon and apparently misread *Hembree v. Mid-America Federal Savings and Loan Association*, 580 N.E. 2d 1103, 1111 (Ohio Ct. App. 1989). *Hembree* involved an executory contract of sale.

The term mortgagor relates only to the mortgage. The person who is conveying the property (who may or may not be the mortgagor) is the grantor, vendor or transferor. The mortgagor does not lose this designation when transferring the property to the grantee, vendee or transferee on an assumption. Additionally, he retains his rights against the grantee. *See*, GRANT S. NELSON AND DALE A. WHITMAN, REAL ESTATE FINANCE LAW, (West 2d ed. 1985) § 5.11 at 286. There is nothing in *Hembree* to indicate that the vendor lost his rights as a mortgagor. In fact the opposite was true. In *Hembree*, the mortgagee was negotiating with Mr. Carter even after the action was filed. *Id.* at 1106. Additionally, the *Hembree* court continued to refer to Mr. Carter as the mortgagor and to Mr. Hembree as the "foreclosed mortgagor's grantee." *Id.* at 1111.

The position articulated by the Federal Circuit and the Court of Veterans Appeals is at odds with other federal

courts that have addressed this issue. Both *United States v. Murdock*, 627 F.Supp. 272 (N.D.Ind. 1985) and *United States v. Whitney*, 602 F.Supp. 722 (W.D.N.Y. 1985) addressed cases involving third parties who assumed loans from the veterans. Both cases recognized the veterans as mortgagors and upheld their right to a common law equity of redemption.

Under Ohio common law and general American common law Mr. Wells was the mortgagor. Consequently, he had the right to the common law equity of redemption.

In reaching their decision, the Federal Circuit conflicted with the findings of the Supreme Court of Ohio. Although property law is not normally a matter of federal concern, it does become a federal question when it is considered as the basis for a constitutionally protected federal interest, or as discussed *infra*, the basis for applying a federal statute. Consequently, the issue is a proper matter for

review under Rule 10(a).

III. Congress did not intend 38 U.S.C. 3702(b) to allow the Secretary to withhold the restoration of benefits arising out of a deed in lieu of foreclosure.

Destruction through natural disasters is consistent with the popular use of the term loss. In the loan guaranty context, insurance funds would be available to compensate the Secretary for any loss due to the destruction of the property. The same would hold true for condemnation when "just compensation" is paid.

The requirement to repay the loss envisioned by 38 U.S.C. 3702(b) derives from the Secretary's right to indemnification. *United States v. Shimer*, 367 U.S. 374, 387 (1961). The *Shimer* Court relied on the RESTATEMENT OF THE LAW OF SECURITY (1941) which holds that indemnification synonymous with insurance. RESTATEMENT OF SECURITY § 82, comment l. (1941). "The word 'loss' in its common usage is defined as 'state or fact of being lost or

destroyed, ruin, destruction," *Sitzman v. National Life & Acc. Ins,. Co.*, 182 N.E.2d 448, 450 (1962). Additionally, the term "'loss' implies that the property is no longer in existence," *Littrell v. Allemannia Fire Ins. Co. of Pittsburgh Pa.*, 226 N.Y.S. 243, 244 (1928).

This definition is in consonance with the Congressional intent as reflected in the legislative history of the Veterans Housing Act of 1974 (P. L. 93-569). The Congressional intent was to expand opportunities for veterans to obtain loan guaranties. (S. Rep. No. 1334, 93rd Cong., 2nd Sess. (1974), *reprinted in* U.S.C.C.A.N. 6798, 6803.

The term loss also implies a lack of control on the part of the party sustaining the harm. The First Circuit analyzed this issue in *Providence Journal Co. v. Broderick*, 104 F.2d 614 (1st Cir. 1939) finding that:

> "[a] loss is 'the unintentional parting with something of value'. (Webster.) Whether the

> plaintiff parted with its buildings intentionally or otherwise is necessarily the most important factor in determining whether it really sustained a loss."

Id. at 616. *But see, Dixon v. United States*, 68 F.3d 1253 (10th Cir. 1995)

The Secretary was in complete control of the situation and the appellant was intentionally excluded from deliberations. The Secretary made his decision with full knowledge that a deficiency would result. Consequently, the deficiency in this case was not a "loss" within the scope of the statute.

The findings of the Federal Circuit are in conflict with the findings of the First Circuit in *Providence Journal*, *supra*. Consequently, review is appropriate under Rule 10(a).

IV. The Soldier's and Sailor's Relief Act precluded the Secretary from taking administrative action such as acceptance of a deed in lieu of foreclosure to the detriment of petitioner, his assigns, his property or his equity of redemption while petitioner was on active duty.

Petitioner was on active duty with the Navy at the time the property was purchased, when the deed in lieu of foreclosure took place and when he initiated his claim against the Secretary for damages. Accordingly he was protected by the Soldiers and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, *as amended*, 50 U. S. C. App. § 525

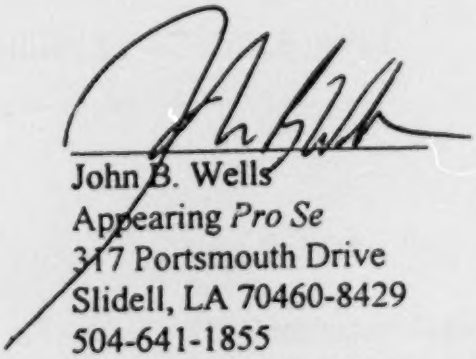
In a similar case, this Court set aside a tax sale on the basis of § 525. *Conroy v. Aniskoff*, 507 U.S. 511 (1993). In by applying § 525 to toll the redemption period. The statute is not limited to tax collection. Rather it includes any "obligation" and specifically encompasses agency action. Accordingly, *Conroy* controls in this setting. Once it was determined that petitioner was on active duty, the Secretary should have taken no further agency action. Accordingly, the Secretary's acceptance of the deed in lieu of foreclosure was clear legal error.

The actions of the Federal Circuit are at odds with

this Court's decision in *Conroy*. Failure to resolve any confusion on this issue may result in other Circuits seeking to improperly limit the application of § 525. Accordingly, this Court should grant certiorari under Rule 10(c).

CONCLUSION

If this Court does not grant certiorari, then the actions taken by the VA, to the detriment of the veteran, without notice to him, will be allowed to stand. Congress established a system of veterans benefits to aid those who have served our country in uniform. Fundamental fairness requires that veterans laws and regulations not be applied arbitrarily. For the reasons delineated herein, petitioner prays that a writ of certiorari be issued.



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CERTIFICATE OF SERVICE

Pursuant to Rule 29.4(a), I, the undersigned, certify that I have served the Solicitor General of the United States, representing respondent Jesse Brown, Secretary of Veterans Affairs, via first class mail, postage pre-paid, this 25th day of August, 1997.

John B. Wells

DOCKET NO. _____

SUPREME COURT OF THE UNITED STATES

1996-97 TERM

JOHN B. WELLS,

Petitioner-Appellant

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

Appendix to Petition for Writ of Certiorari

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NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

96-7065

JOHN B. WELLS,

Claimant-Appellant,

V.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

DECIDED: June 6, 1997

Before RICH, Circuit Judge, COWEN, Senior Circuit Judge,

and MICHEL, Circuit Judge PER CURIAM.

DECISION

John B. Wells (Wells) appeals from an August 29,1996, judgment of the United States Court of Veterans Appeals (CVA), Docket No.95-128, affirming a decision of the Board of Veterans' Appeals (BVA) denying restoration of Wells's full Veterans Administration (VA) home loan guaranty entitlement. Because Wells has neither demonstrated that he retained a property interest in the restoration of his expended VA home loan guaranty entitlement nor retained an equitable right of redemption, either of which would afford him procedural due process protections under the Fifth Amendment of the Constitution, we affirm.

BACKGROUND

In 1978, while on active duty in the United States Navy, Wells purchased a home in Chesapeake, Ohio. He financed the purchase through a mortgage obtained from the McLendon Mortgage Co. Pursuant to 38 U.S.C. §§ 3710(a)(1) and 3702(a)(1) (1996), a certain percentage of the mortgage amount was guaranteed by VA. As a result, Wells's

loan guaranty entitlement was reduced by the amount guaranteed. 38 U.S.C.§ 3703(a)(1)(B) (1996).

In 1979, Wells sold the home to Roy G. Osborn (Osborn) and Shirley D. Stamper, and allowed Osborn to assume his mortgage. On July 1, 1981, Osborn defaulted on the loan. Shortly thereafter, Osborn offered to tender a deed in lieu of foreclosure to First Family Mortgage Corp. (First Family), the loan holder at that time. In February 1982, VA authorized First Family to accept Osborn's deed in lieu of foreclosure in full satisfaction of the indebtedness. VA did not notify Wells of Osborn's default, nor did it notify Wells that it had approved the acceptance of the deed in lieu of foreclosure.

First Family submitted a claim in the amount of $5,539.67 under the loan guaranty, and in February 1983 VA approved the claim. VA did not notify Wells that it was paying the $5,539.67 guaranty claim.

In 1989, due to his request for a determination of his eligibility status for a home loan guaranty, Wells obtained knowledge of Osborn's default and subsequent events. He

was also informed that his loan guaranty entitlement was reduced by $17,500.00 -the guaranty amount used in the Chesapeake, Ohio home purchase. To restore his full loan guaranty entitlement, VA advised Wells that, pursuant to 38 U.S.C. § 3702(b)(1)(B), the $5,539.67 loss had to be paid in full.

The BVA denied Wells's request for the restoration of his full loan guaranty entitlement. The CVA affirmed the BVA's decision, and addressing Wells's fifth amendment due process arguments, held that Wells did not have a property interest in the restoration of his expended VA loan guaranty entitlement or an equitable right of redemption.

DISCUSSION

I.

This court, pursuant to 38 U.S.C. § 7292 (1994), has been given only limited jurisdiction to review decisions of the CVA. In such cases, we may review and decide only challenges to the validity of statutes or regulations, and interpret constitutional and statutory provisions to the extent presented and necessary to a decision. 38 U.S.C. § 7292; Livingston v. Derwinski, 959 F.2d 224, 226 (Fed. Cir. 1992).

II.

First, Wells contends that the CVA erred in concluding that he did not have a property interest in the restoration of his VA loan guaranty benefits which would invoke the due process clause of the Constitution. He argues that the instant case is unlike Owings v. Brown, 8 Vet. App. 17 (1995), affd, 86 F.3d 1178 (Fed. Cir. 1996) (table), relied upon by the CVA, since here no Congressional modification to a statute occurred.

We cannot agree. The manner by which an interest is later affected does not shed light on whether that interest is a property interest protected by procedural due process. In Board of Regents v. Roth, 408 U.S. 564,577 (1972), the Supreme Court set forth "[c]ertain attributes of 'property' interests protected by procedural due process." To have such a property interest in a benefit, a person must have more than a unilateral expectation, he must have a legitimate claim of entitlement to the benefit. Id. Contrasting the situation in Roth with that in Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court noted that, unlike the terms of Roth's one-year, fixed term teaching appointment, the welfare recipients in Kelly had a legitimate claim of entitlement to welfare payments grounded

in the statute defining their eligibility. Id. at 577-78. Since, by the terms of his appointment, Roth did not have a continuing interest in his employment, he has no claim of entitlement to re-employment. Id. at 578.

Similarly, under the circumstances of this case, Wells had no legitimate claim of entitlement grounded in the statute defining eligibility for the restoration of his full VA home loan guaranty. The conditions set forth in 38 U.S.C. § 3702(b) (1996) must be met to restore a previously used VA home loan guaranty entitlement. For full restoration, barring certain limited exceptions not relevant in this case, the loss must be repaid in full. 38 U.S.C. § 3702(b). Once Wells utilized his original guaranty benefits, he had a mere unilateral expectation of repaying his loan, and thus, according to the terms of § 3702(b), had a mere unilateral expectation of restoring his full guaranty benefits. That mere unilateral expectation was not converted to an entitlement when Wells allowed Osborn to assume his mortgage.

III.

Wells also contends that the CVA erred in concluding that he did not retain an equity of redemption under Ohio

common law which would invoke procedural due process rights under the Constitution. Wells argues that even after Osborn assumed his mortgage, Wells continued as the mortgagor with an equitable right of redemption.

Again, we cannot agree. The CVA did not err in concluding that under Ohio common law Wells did not retain an equitable right of redemption after Osborn purchased the Chesapeake, Ohio home and assumed the original mortgage. Under Ohio common law, once Wells, the vendor, sold his home to Osborn, the purchaser, Osborn acquired Wells's equitable right of redemption. See, e.g., Hembree v. Mid-America Fed. Savings & Loan Ass'n, 580 N.E.2d 1103, 1111 (Ohio Ct. App. 1989). Accordingly, since Wells did not retain an equitable right of redemption after he sold his home to Osborn, we need not consider whether such an interest is a property interest protected by the due process clause of the Constitution.

IV.

We have carefully considered Wells's remaining arguments and hold that they are without merit. Therefore, we affirm the judgment of the CVA.

UNITED STATES COURT OF VETERANS APPEALS

No.95-128

John B. Wells, APPELLANT

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Boa[illegible]of Veterans' Appeals

(Argued June 21, 1996 Decided AUG 7 1996)

John B. Wells, Esq., pro se

Adam K Llewellyn, with whom *Mary Lou Keener,* General Counsel; *Ron Garvin,* Assistant General Counsel; and *David W Enget* Deputy Assistant General Counsel, were on file brief, for the appellee.

Before FARLEY, HOLDAWAY, and IVERS, Judges.

FARLEY, *Judge:* This is an appeal from a January 31, 1995, decision of the Board of Veterans' Appeals (BVA or Board) which denied the restoration of full VA home loan guaranty

entitlement. At issue is whether VA, in falling to notify the appellant that it would accept a deed-in-lieu of foreclosure from the appellant's assignee, deprived the appellant of a property right without due process and without just compensation. This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. § 7252(a). For the reasons that follow, the Court will affirm the decision of the BVA.

I. FACTUAL BACKGROUND

In September 1978, the appellant purchased a home with a loan which was guaranteed, in part, by VA. Record (R.) at 20-37. In doing so, the appellant used $17,500 of a possible $36,000 of his home loan guaranty entitlement. R. at 134.

In 1979, the appellant conveyed the property by way of a warranty deed to Roy Osborn and Shirley Stamper (the assignees). R. at 41. The record does not contain an agreement regarding the assumption of the mortgage.

Further, while it appears that Roy Osborn may have been a veteran eligible for a VA home loan guaranty, neither he nor the appellant ever substituted Mr. Osborn's entitlement for that of the appellant R. at 124.

The loan was first in default in December 1979. R. at 46. The notice of default, completed by the lender, contained only the names of the assignees. R. at 46. The default was cured in March 1981 (R. at 71), but the loan was in default again in July 1981 (R. at 83). Again, the notice of default contained only the names of the assignees. R. at 83. The appellant was not notified of either default

In October 1981, the lender notified VA, but not the appellant, of its intention to foreclose. R. at 78-79. Shortly thereafter, Roy Osborn and Shirley Stamper requested that, in lieu of foreclosure, they be permitted to turn over the deed to the property to the lender. R. at 81. In February 1982, VA expressly authorized the lender to accept the deed in lieu of

foreclosure in full satisfaction of the guaranteed indebtedness. R. at 99. VA did not notify the appellant that it had authorized acceptance of a deed-in-lieu of foreclosure, although the appellant's name did appear on a number of documents pertaining to the conveyance of the deed. See R. at 95, 105, 109,118,120,122. In June 1982, the property was conveyed by the lender to VA. R. at 109, 111. Satisfaction of the mortgage was recorded in September 1982. R. at 114. The lender filed a claim for its deficiency under the loan guaranty (R. at 118), and in February 1983, VA notified the lender that its claim was approved and that it would soon receive a check in the amount of $5,539.67. R. at 122. VA did not notify the appellant that it was paying this claim, or that VA would treat this as a "write-off." R. at 118, 120.

In 1989, the appellant requested a determination of his eligibility status for a home loan. See R. at 124-25. The appellant was advised for the first time that VA had accepted

a deed-in-lieu of foreclosure with respect to his account. *See ibid; see also* R. at 130. The appellant was furthered informed that his remaining loan guaranty entitlement was $18,500, or the amount of his full eligibility ($36,000) less the $17,500 entitlement used for his initial purchase. R. at 134. Full entitlement would not be restored under 38 U.S.C. § 1802(b) (currently codified at 38 U.S.C. § 3702(b)) because VA had suffered a loss in thee amount of $5,539.67, the amount of the claim paid by VA to the lender under the guaranty. R. at 130, 132.

In December 1989, the appellant asserted in a letter that VA's failure to notify him of a foreclosure had denied him due process. R. at 137-38. In February 1990, VA advised the appellant that (1) he was not indebted to VA in the amount of $5,539.67; (2) repayment of $5,539.67 from any source would restore his full entitlement; and (3) there is no requirement that the original veteran-obligor be contacted if

a deed-in-lien of foreclosure is accepted in order to avoid foreclosure. R. at 140; *see also* R. at 144. In November 1990, the appellant demanded that his full loan guaranty eligibility be immediately restored. R. at 150-51. After additional correspondence, the Cleveland, Ohio, regional office issued a Statement of the Case in January 1992. In August 1992, the appellant requested and was granted a hearing before the BVA, and again asserted that be bad been denied due process. R. at 179-85, 188.

In January 1995, the BVA determined that restoration of the appellant's full loan guaranty entitlement could not be restored until the loss to VA is recovered. R. at 10. In its opinion, the BVA stated that "the unenforceability of collection of the debt, does not, in itself, serve to reinstate full entitlement to loan guaranty benefits... [T]he Secretary's loss must be repaid in order for the appellant's loan eligibility to be restored, even if the debt has been eliminated." R. at

10-11. Further, while the Secretary may waive that requirement under 38 U.S.C. § 3702(b), "it is established policy of the VA . . . that waiver will be appropriate only in unusual situations involving catastrophic loss to a veteran, such as natural disasters." R. at 11. The BVA did not address the appellant's constitutional arguments.

On appeal, the appellant argues that be had a property interest in both the restoration of his VA loan entitlement and his equitable right of redemption of the property. These interests are sufficiently within the scope of the due process clause, he argues, to have required the Secretary to provide adequate notice of the default or impending deed-in-lieu of foreclosure proceedings prior to extinguishing these interests. He further argues that VA's "constitutionally infirm" actions entitle him to compensation under the taking clause of the Fifth Amendment and under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Finally, the appellant argues that the Soldiers and Sailors' Civil Relief Act of 1940 barred the Secretary from bringing any action, including an administrative action, to accept a deed-in-lieu of foreclosure against the appellant while he was on active duty.

The Secretary argues that, while the appellant was not given notice before VA accepted the deed-in-lieu of foreclosure, no notice was required because the appellant did not have a cognizable property interest in his VA loan entitlement. According to the Secretary, the appellant "has merely used a government benefit in a manner that precludes him from using it again" Secretary's Brief (Br.) at 10. With respect to any equitable right of redemption, the Secretary argues that "the only interest Appellant retained relative to the [real] property was a contingent future liability to indemnify the VA should his assumption-transferee default." *Id* at 11. This interest, argues the Secretary, is merely a

unilateral expectation which is not protected by the due process clause. *Ibid.* The Secretary concludes, then, that he is constrained by the dictates of veterans benefits law, specifically 38 U.S.C. § 3702(b), which precludes him from restoring the appellant's full entitlement until the Secretary recovers his loss.

II. VA HOME LOAN GUARANTY

VA guarantees loans made to eligible veterans by private lenders for, inter alia, the purchase of a dwelling to be owned and occupied by the veteran 38 U.S.C. § 3710(a)(1). Eligible veterans are entitled to a VA loan guaranty of $36,000 for loans under $144,000. 38 U.S.C. §§ 3703(a)(1)(A)(i)(III), (IV), and (a)(1)(B). As to loans under $144,000, such as the one in this case, eligible veterans are entitled to a maximum VA loan guaranty of $36,000. *Ibid.* A veteran who previously obtained a VA loan can use any remaining entitlement for a second purchase. In addition,

entitlement used for the previous purchase may be restored and reused if any of the following conditions are met:

(1) (A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and

(B) the loan has been repaid in fall, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full.

(2) A veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use of the veteran-transferee's entitlement, to the extent that the entitlement of the veteran-transferor had been used originally, in place of the veteran-transferor's for the guaranteed, insured, or direct loan, and the veteran-transferee otherwise meets the requirements of this chapter.

(3) (A) The loan has been repaid in full; and

(B) the loan for which the veteran seeks to use entitlement under this chapter is secured by the same property which secured the loan referred to in subparagraph (A) of this paragraph.

(4) In a case not covered by paragraph (1) or (2) -

> (A) the loan has been repaid in full and, if the Secretary has suffered a loss on the loan, the loss has been repaid in full; or
>
> (B) the Secretary has been released from liability as to the loan and, if the Secretary has suffered a loss on the loan, the loss has been paid in fall.

38 U.S.C § 3702(b). Further, the Secretary has the discretion to waive any of the foregoing provisions and to exclude from the computation of entitlement any amount of entitlement previously used by a veteran *Ibid.*

In the instant case, the Secretary argues that paragraph (b)(1)(B) precludes restoration of the appellant's full loan guaranty entitlement until VA is reimbursed for any loss on a prior loan. The Secretary points out that restoration is precluded irrespective of whether the appellant may have any legal duty to repay the deficiency suffered by VA. So long as VA has suffered an unreimbursed loss, VA will not guaranty more than the unused portion of the appellant's loan guaranty entitlement

The Secretary is correct that the term "loss" as used in paragraph (b)(1)(B) extends to cases such as this where VA cannot, or does not attempt to, recover any deficiency from the veteran. *See Dixon v. United* Stares, 68 F3d 1253 (10th Cir. 1995). In Dixon, two veterans who had defaulted on VA loans sought to enjoin collection of the debts owed by them to VA and to have their full loan entitlement reinstated. The Tenth Circuit held that VA could not recover against a veteran who had the VA debt discharged in a bankruptcy proceeding, but there was still a "loss" suffered by VA that would reduce that veteran's entitlement by the amount of guaranty used for the previous purchase. *Id.* at 1257.

Were it not for the lack of notice to the appellant before the acceptance of the deed-in-lieu of foreclosure, the Court's inquiry would end here: under the *Dixon* analysis, the appellant would be "simply not eligible for the full amount of guaranty benefits until the loss incurred by the VA is

repaid:.." 68 F.3d at 1257. *Dixon,* however, is distinguishable in that the appellant, unlike the veterans in Dixon, did not receive notice of the intent to foreclose and thus did not have an opportunity to cure any deficiency. While there is now a regulation requiring notice to the "original veteran-borrower" coincident with the notice of intention to foreclose, 38 C.F.R. § 36.4317(c) (1995), it was not in effect at the time the lender gave notice of its intention to foreclose.

III. DUE PROCESS AND JUST COMPENSATION

The fifth amendment to the United States Constitution prohibits the government from depriving "any person of life, liberty, or property without due process of law." The Supreme Court has consistently held that the due process clause requires that notice be given and some form of hearing be held before an individual is finally deprived of a property interest *See, e.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982); *Mathews v. Elridge,* 424 U.S.

319,333 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). The fifth amendment also prohibits the government from taking private property for "public use, without just compensation." Because we hold that the appellant did not have a property interest in his VA loan guaranty entitlement or an equitable right of redemption, we need not reach the issue of whether he was denied due process or just compensation.

A. Property Interest in VA Loan Guaranty Entitlement

In 1970, the Supreme Court held for the first time that due process protections are applicable to the termination of government benefits. *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970). Such benefits "are a matter of statutory entitlement for persons qualified to receive them," and are the equivalent of property for due process purposes. Two years after its decision in *Goldberg*, the Supreme Court further explained that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . . .
>
> Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents, 408 U.S. at 577.

This Court has recognized a property right in veterans' benefits in *Fugere v. Derwinski*, 1 Vet.App. 103, 108 (1990), aff'd 972 F.3d 331 (Fed. Cir. 1992), and in *Thuber v. Brown*, 5 Vet.App. 119, 122 (1993). In *Fugere*, the appellant's benefits had been reduced when VA, without prior notice, decreased his disability rating for a service-connected hearing disorder. In *Thurber*, the appellant was an individual claiming entitlement to service connection for a

spinal condition. This Court, noting that the Supreme Court has not yet ruled on the extent to which applicants for, rather than recipients of, government benefits have property rights in their expectations, cited several lower court cases which had accorded due process right to applicants. *See Id.* at 123 and citations therein.

In contrast, this Court found that an applicant who had filed a claim for the reinstatement of benefits after an act of Congress modified eligibility requirements did not have a property right which was entitled to due process protection. *Owings v. Brown*, 8 Vet.App. 17, 23 (1995), *aff'd* 86 F.3d 1178 (Fed Cir. 1996) (table). In *Owings*, the appellant, recently divorced from her second husband, sought reinstatement of the dependency and indemnity compensation (DIC) benefits which she had received after the death of her veteran husband until her marriage to her second husband. Prior to filing her claim for reinstatement, the relevant law was amended to make remarriage a permanent bar against receiving DIC benefits. She argued

that she had a property interest in the DIC benefits, and that the failure to provide notice or an opportunity for a hearing before the change in law was passed, violated due process. While not deciding the issue of whether the appellant's due process rights were violated, the Court, inter alia, rejected the argument that the appellant could possess a property right in DIC benefits where she had not "previously established an entitlement" to them.

In the instant case, it is clear that the appellant initially had a property interest in his original VA loan guaranty entitlement. Like the claimant in *Thurber,* the appellant had a legitimate claim to entitlement to the benefit in question. *See 5* Vet.App. at 122-23; *see also Board of Regent, 408* U.S. at 578. VA tacitly acknowledged as much when it extended an initial guaranty in 1978, and again in 1989 when it calculated his loan entitlement to be $18,500. The determinative issue here, however, is not whether the appellant had a property interest in his initial loan guaranty entitlement, but whether he had a property interest in the

restoration of his expended entitlement which was used for a previous loam This inquiry requires a review of 38 U.S.C. § 3702(b). *See Board of Regent*, 408 U.S. at 577.

On its face, 38 U.S.C. § 3702(b) precludes restoration and reuse of a veteran's expended guaranty entitlement unless one of several preconditions are met. The only preconditions arguably relevant here are those set forth in paragraphs (1) and (2). Paragraph (1) permits restoration of previously used entitlement if the property has been disposed of by the veteran, and if "the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full." 38 U.S.C. § 3702(b)(1)(B). Paragraph (2) permits restoration of previously used entitlement where another veteran "has agreed to assume the outstanding balance on the loan and consented to the use of the veteran-transferee's entitlement."

The preconditions of § 3702(b)(1) have not been satisfied because the loss suffered by the Secretary has

not been recouped. It is undisputed that the loan was not repaid and that the Secretary, rather than being released from liability, paid $5,539.67 to the lender under the terms of the guaranty. Under *Dixon,* this amount constitutes a "loss" to the Secretary, even if it is not ultimately recoverable from the appellant. As for paragraph (2), it may be inferred from the record that the responsibility for the outstanding balance on the loan was assumed by Mr. Osborn and Ms. Stamper *(see* R. at 95), but there is no evidence that Mr. Osborn ever consented to substitute his eligibility for that of the appellant. Further, the record affirmatively indicates, as conceded during oral argument, that the appellant did not take any steps to ensure that Mr. Osborn would substitute his eligibility for the appellant's. R. at 137. Having used his original loan guaranty entitlement, the most the appellant could have had at the time of sale (and at the time of the subsequent default) was a 'unilateral expectation" that, at some future date, he would be able to have his full entitlement restored. *See Board of Regents,* 408 U.S. at 577.

Had his assignees not defaulted under the mortgage note, this future date would not have been before October 1, 2008 – the date on which the loan was scheduled to have been paid off and he would have become eligible under paragraph (b)(1)(B) for the restoration of his full entitlement Any expectation on the part of the appellant that his eligibility would be restored is even more "abstract" in light of his admitted failure to take steps to ensure that his assignee's entitlement was substituted for his. *See Board of Regents,* 408 U.S. at 577.

Thus, the appellant has not established that he had a claim of entitlement "grounded in the statute defining eligibility." *Board of Regents,* 408 U.S. at 577 (discussing *Goldberg).* The appellant's claim in this respect is similar to that of the appellant in *Owings.* Both appellants are precluded, by the terms of the relevant statutory provisions, from qualifying for the benefit sought The appellant's "unilateral expectation" of restoration of his expended entitlement at some future time is not a property right

entitled to due process protection. *Ibid.*

B. Property Right in the Equity of Redemption

Under the governing state law, a mortgagor has an absolute right to redeem property in order to prevent foreclosure sale. *See Hausman v. City of Dayton, 653* N.E.2d 1190, 1194 (Ohio 1995). The appellant asserts that he possessed a right to redeem because he remained the "mortgagor" even after the property was transferred to, and the responsibility for the loan secured by the property assumed by, Mr. Osborn and Ms. Stamper. According to the appellant, the designation of "mortgagor" does not pass to the individual assuming the mortgage, but this bald statement is not supported by citation to any relevant statutory or case authority and the Court could find none. The Court finds no basis in law, fact, or the record for concluding that the appellant retained the right to redeem after he sold the property to Mr. Osborn and Ms. Stamper and they assumed responsibility for the loan. Nor is there any basis for concluding that such a right may be exercised by the original

owner to prevent a subsequent owner from conveying title to the property to prevent foreclosure of that property.

It is important to distinguish between the rights and responsibilities which flow from three distinct entities: the deed to the underlying property, the mortgage or note, and the VA guaranty. In this case, the appellant, as the original purchaser, transferred ownership, i.e., the deed to the underlying property, to the new purchasers, Mr. Osborn and Ms. Stamper. In addition, it appears that the purchasers assumed responsibility for the mortgage payments *(see, e.g.,* R. at 95), thereby terminating the appellant's status as mortgagor and any rights and obligations derived from that status, including the equity of redemption *See, e.g., Hembree v. Mid-America Federal Savings & Loan,* 580 N.E.2d 1103, 111 (Ohio Ct App. 1989) ("A vendee in a contract of sale acquires his vendor's equity of redemption and has the right to redeem the mortgaged premises"); *see also* 1 GRANT S. NELSON & Dale A. WHITMAN, REAL ESTATE FINANCE LAW (hereinafter "NELSON") § 7.2 (1994) ("a

mortgagor who has conveyed away or otherwise lost all interest in the property cannot redeem); 55 AM. JUR. 2D *Mortgages* § 898 ("It is obvious that the mortgagor may lose his right [to redeem] by parting with all of his interest in the mortgaged property"). The assumption of rights and obligations under the mortgage note by Mr. Osborn and Ms. Stamper, of course, had no effect on the terms of the loan guaranty between the appellant and VA, and thus the appellant remained responsible for the consequences of any debt which was assumed by VA as a result of the guaranty. *Cf Vail v. Derwinski*, 946 F.2d 589 (8th Cir. 1991) ("VA's right to indemnity derives from a contract independent of the mortgage," i.e., the VA guaranty); *see also* 38 U.S.C. § 3713(b); 38 C.F.R. § 36.4323(e), (f).

The appellant has cited several cases in which courts outside of his jurisdiction have found that a transferor of property retains a property right in the equitable right of redemption. *Federal Deposit Insurance Corp. v. Morrison*, 747 F.2d 610 (11th Cir. 1984); *United States v. Murdock*, 627

F. Supp. 272 (N.D. Ind. 1985); *United States v. Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985). However, *Morrison* is distinguishable in that the court made an express finding that the transferor retained rights and obligations as a *mortgagor*. *Morrison*, 747 F.2d at 612. *Whitney* and *Murdock*, if nothing else, demonstrate the need for precision. In each, the courts failed to distinguish the mortgage note from the guaranty, and thus appear to have held that the liability resulting from the guaranty somehow entitled the transferor to redeem the underlying property as if he remained liable under the mortgage. We cannot find a basis on which to hold that a right to redeem somehow springs from the appellant's obligations under the terms of the VA guaranty apart from the mortgage note, and therefore, to the extent that *Whitney* and *Murdock* hold otherwise, we must respectfully disagree.

In any event all of the cases relied upon by the appellant for the proposition that he has a right to redeem are distinguishable in that each deals with the right to redeem in the context of a foreclosure proceeding. The appellant has

not cited, and the Court is unable to find, any authority for the proposition that the seller of real property has a right to redeem that property prior to its conveyance by the subsequent owner to the mortgagee *in lieu of foreclosure* Rather, it appears that in the deed-in-lieu of foreclosure scenario, the only right to redemption is that of the property owner because a "deed-in-lieu of foreclosure" is '[t]he procedure whereby a mortgagor/debtor reconveys his equity of redemption in the defaulted property to the mortgagee/creditee in consideration of the creditor's promise to forebear from suing on the debt or foreclosing the security." 3 RICHARD R. POWELL & PATRICK ROWAN, POWELL ON REAL PROPERTY § 469.1(1992); *see also* 1 NELSON § 3.3. Thus, the right to redeem, which was transferred by the appellant with his interest in the underlying property, was subsequently exercised by Mr. Osborn and Ms. Stamper when they conveyed title in the property to VA in order to avoid foreclosure proceedings.

As neither the record, nor any authority cited

by the appellant, compels the conclusion that the appellant retained a right to redeem after he transferred the deed to Mr. Osborn and Ms. Stamper, he cannot be said to have a property right in the common law equity of redemption.

IV. SOLDIERS AND SAILORS CIVIL RELIEF ACT

The Soldiers and Sailors Civil Relief Act, codified at 50 U.S.C. § 501 et seq., precludes, inter alia, "the bringing of any action or proceeding in any court .... or ..... agency of government... against any person in military service." 50 U.S.C. § 525. Insofar as we have held that the appellant had no interest in redeeming the underlying property, the conveyance of the deed by the appellant's assignees to VA cannot be construed as an "action or proceeding... against" the appellant. Thus, under the facts of this case, 50 U.S.C. § 525 did not preclude the Secretary from accepting a deed-in-lieu of foreclosure from the appellant's assignees while the appellant was on active military service.

V. CAUSE OF ACTION FOR DAMAGES

The appellant argues that he has a federal cause of action and can recover money damages for the deprivation of his constitutional rights pursuant to *Bivens*, 403 U.S. at 388. However, even had the Court determined that VA violated a constitutional right of the appellant, he would not have a cognizable cause of action for money damages before this Court. In Bivens, the Supreme Court held that a petitioner could recover money damages against individual agents of a governmental agency for injuries incurred as a result of constitutional violations by those agents, but not against the United States or the agency itself. Further, a violation of the appellant's due process rights would entitle him only to nominal damages in the absence of proof of actual injury, and none has been offered. *Carey v. Piphus, 435* U.S. 247,265 (1978). Finally, this Court does not have the authority to award money damages. *See Masors v. Derwinski,* 2 Vet.App. 181 (1992).

VI. CONCLUSION

Upon consideration of the record, the submissions of the parties, and oral argument, the January 31, 1995, decision of the BVA is AFFIRMED.

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
JOHN B. WELLS

SS 341427792
LH496494

DOCKET NO. 93-06 263) DATE JAN 31, 1995
)
)

On appeal from the decision of the Department of Veterans Affairs Regional Office in Cleveland, Ohio

THE ISSUE

Restoration of full loan guaranty entitlement.

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Christopher P. Kissel, Associate Counsel

IN THE APPEAL
OF JOHN B. WELLS

SS 341 42 7792
LR 496 494

INTRODUCTION

This case comes before the Board of Veterans' Appeals (the Board) on appeal from a decision of the Cleveland, Ohio, Department of Veterans Affairs Regional Office (VARO).

The Board may not adjudicate the appellant's claims alleging violations of his due process rights protected under the Fifth Amendment of the United States Constitution. *See* Appellant's Brief, Issues II and III, pgs. 4, 10 (September 17, 1994). The jurisdiction of the Board to decide a particular issue on appeal is limited, as set forth under its Rules of Practice. 38 CFR. § 20.101(a) (1993). His claims alleging that his property interests in the subject property, in essence a right of redemption, and in the full restoration of his entitlement to loan guaranty benefits, were violated when VA failed to inform him of the transferee's default, impending foreclosure, and acceptance of deed in lieu of foreclosure, and, as a result of such violations, he is entitled to monetary damages from the government in the amount of $58,620, simply do not fall within the jurisdictional scope of the Board.

Consequently, the only issue that will be considered by the Board is the one that is currently certified for appellate review, restoration of full loan guaranty entitlement under Title 38 of the United States Code and applicable regulatory provisions.

CONTENTIONS OF APPELLANT ON APPEAL

The appellant contends, in substance, that his entitlement to full loan guaranty privileges should be restored in order not to continue to punish him because of an old invalid debt.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991), has reviewed and considered all of the evidence and material of record in the veteran's claims file(s). Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that the appellant is not entitled to restoration of his loan guaranty entitlement until the loss sustained by the government is repaid.

FINDINGS OF FACT

1. In September 1978, the appellant purchased a house using a home loan which was guaranteed, in part, by VA.

2. The record reflects that in 1979, the appellant conveyed his interest in the house on an assumption basis to R. G. Osborn, without benefit of release of liability.

3. Starting in July 1981, the transferee, R. G. Osborn, defaulted on the loan payments. Mortgage foreclosure proceedings were initiated in September 1981.

4. In February 1982, VA accepted the transferee's request for a deed-in-lieu of foreclosure. The VA's acceptance of the deed-in-lieu of foreclosure resulted in a conveyance of the subject property to VA.

5. In February 1983, VA paid the lender's loan guaranty claim, resulting in a loss to the government in the amount of $5,539.67.

6. In January 1990, VARO informed the appellant that he was not indebted to the VA for the amount paid on the loan guaranty claim.

7. The VA's loss of the loan guaranty claim payment has not been repaid.

CONCLUSION OF LAW

Restoration of loan guaranty entitlement is not available to the appellant until the loss which the Secretary of Veterans Affairs sustained in connection with the loan is repaid. 38 U.S.C.A. § 3702(b)(West 1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Initially, the Board finds that the appellant has submitted evidence which is sufficient to justify a belief that his claim is well grounded. 38 U.S.C.A. § 5107(a) (West 1991) and *Murphy V. Derwinski,* 1 Vet.App. 78 (1990). Furthermore, in

the opinion of the undersigned, this case has been adequately developed for appellate purposes by VARO which allows the Board to proceed to a disposition on the merits.

The appellant is seeking restoration of full entitlement to loan guaranty benefits. 38 U.S.C.A. § 3702 (West 1991). He has also raised a number of constitutional claims alleging violations of his due process rights under the Fifth Amendment of the U. S. Constitution; however, for the reasons cited above in the Introduction, the Board must decline appellate consideration of those claims.

The computation of loan guaranty entitlement is governed by statute and regulation, and begins with an amount based on the type of realty and/or the principal loan amount. Where entitlement has previously been used, the amount used is subtracted from the full guaranty provided by regulation. If the property has been disposed of, but VA has suffered a loss on the loan, the amount of the loss may not be excluded from the computation until repaid in full. 38 U.S.C.A. § 3702(b)(l) (West 1991); 38 C.F.R. § 36.4302(d)(2) and (i)(l)(2)(1993). The statute reads as follows:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the

amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured or direct loan, if-

(I)(A) the property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and

(B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full; ....

The appellant became obligated under the terms of a home loan which was guaranteed, in part, by VA, when he purchased a house in Chesapeake, OH, in September 1978; however, he conveyed his interest in the house to the transferee, Mr. Osborn, who then subsequently defaulted on the mortgage payments. In February 1982, VA accepted a deed-in-lieu of foreclosure from the transferee and the subject property was reconveyed to VA. A claim was subsequently paid by VA under its loan guaranty to the lender, resulting in a loss to the Government in the amount of $5,539.67. In November 1989, the appellant applied for his available loan guaranty entitlement; however, he was informed by VARO that although be was not liable for the amount paid on the aforementioned claim, entitlement to his

benefits under VA's loan guaranty program could not be restored until the amount of the loss was paid in full. This appeal followed.

After having considered the substantive and procedural history of this case, the appellant's contentions, and the applicable law and regulations, the Board has concluded that the appellant should not be granted restoration of his entitlement to VA home loan benefits until such time as the loss to the Department of Veterans Affairs has been recovered. The Board emphasizes that a distinction must be made between no "debt" to the veteran and the "loss" to the VA. It follows that the unenforceability of collection of the debt does not in itself, serve to reinstate full entitlement to loan guaranty benefits. In general, individuals are obligated to repay the Government for any loan guaranty claim payments. 38 C.F.R. § 36.4323(e) (1993). While an obligation to repay the loan guaranty may be eliminated by means of a number of mechanisms, including a finding that VA failed to comply with due process requirements under 38 U.S.C.A. § 3732 (West 1991), the Secretary's loss must be repaid in order for the appellant's loan eligibility to be restored, even if the debt has been eliminated. 38 U.S.C.A. § 3702(b)(l) (West 1991).

38 U.S.C.A. § 3702(b) also contains a provision which states that "[t]he Secretary may, in any case involving

circumstances the Secretary deems appropriate, waive one or more of the conditions prescribed in clause (1)...." However, it is the established policy of the VA, based on the law and regulations, that waiver will be appropriate only in unusual situations involving catastrophic loss to a veteran, such as natural disasters. Accordingly, the waiver provisions found in the last sentence of section 3702(b) are not for application in this case. To date, the Department has not promulgated regulations providing for "waiver" in cases where a debt is found to be invalid owing to failure by the VA to provide notice.

Our findings regarding the loss repayment requirement, and the waiver provision, are supported by the legislative history of section 3702(b) as presently constituted. *See* S. Rep. No.93-1334, 93d Cong., 2d Sess. (1974) at 20,21,30,31. The undersigned therefore concludes that the appellant's entitlement to VA loan guaranty benefits may not be restored until the Secretary's loss is made good.

ORDER

Restoration of loan guaranty entitlement is denied.

KENNETH R ANDREWS, JR
Member, Board of Veterans' Appeals

Text of Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations

United States Constitution - Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

38 U.S.C. Sec. 3702(b)

(b) In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured, or direct loan, if -
(1)(A) the property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and

(B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full;
(2) a veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use of the veteran-transferee's entitlement, to the extent that the entitlement of the veteran-transferor had been used originally, in place of the veteran-transferor's for the guaranteed, insured, or direct loan, and the veteran-transferee otherwise meets the requirements of this chapter; or

(3)(A) the loan has been repaid in full; and

(B) the loan for which the veteran seeks to use entitlement under this chapter is secured by the same property which secured the loan referred to in subparagraph (A) of this paragraph. The Secretary may, in any case involving circumstances the Secretary deems appropriate, waive one or more of the conditions prescribed in clause (1) of the preceding sentence.

38 U.S.C. § 3703. Basic provisions relating to loan guaranty

(a) (1) (A) Any loan to a veteran eligible for benefits under this chapter [38 U.S.C. §§3701 et seq.], if made for any of the purposes specified in section 3710 of this title and in compliance with the provisions of this chapter [38 U.S.C. §§3701 et seq.], is automatically guaranteed by the United States in an amount not to exceed the lesser of--
(i) (I) in the case of any loan of not more than $45,000, 50 percent of the loan;
(II) in the case of any loan of more than $45,000, but not more than $56,250, $22,500;
(III) except as provided in subclause (IV) of this clause, in

the case of any loan of more than $56,250, the lesser of $36,000 or 40 percent of the loan; or
(IV) in the case of any loan of more than $144,000 for a purpose specified in clause (1), (2), (3), (6), or (8) of section 3710(a) of this title, the lesser of $50,750 or 25 percent of the loan; or"; and
(ii) the maximum amount of guaranty entitlement available to the veteran as specified in subparagraph (B) of this paragraph.
(B) The maximum amount of guaranty entitlement available to a veteran for purposes specified in section 3710 of this title shall be $36,000, or in the case of a loan described in subparagraph (A)(i)(IV) of this paragraph, $50,750, reduced by the amount of entitlement previously used by the veteran under this chapter [38 U.S.C. §§3701 et seq.] and not restored as a result of the exclusion in section 3702(b) of this title.
(2) (A) Any housing loan which might be guaranteed under the provisions of this chapter [38 U.S.C. §§3701 et seq.], when made or purchased by any financial institution subject to examination and supervision by an agency of the United States or of any State may, in lieu of such guaranty, be insured by the Secretary under an agreement whereby the Secretary will reimburse any such institution for losses incurred on such loan up to 15 per centum of the aggregate of loans so made or purchased by it.
(B) Loans insured under this section shall be made on such other terms, conditions, and restrictions as the Secretary may prescribe within the limitations set forth in this chapter [38 U.S.C. §§3701 et seq.]

38 U.S.C. § 3710.

(a) Except as provided in section 3704(c)(2) of this title, any

loan to a veteran, if made pursuant to the provisions of this chapter [38 U.S.C. §§3701 et seq.], is automatically guaranteed if such loan is for one or more of the following purposes:
(1) To purchase or construct a dwelling to be owned and occupied by the veteran as a home.

38 U.S.C. Sec. 3732

(a)(1) In the event of default in the payment of any loan guaranteed under this chapter, the holder of the obligation shall notify the Secretary of such default. Upon receipt of such notice, the Secretary may, subject to subsection (c) of this section, pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed. Except as provided in section 3703(e) of this title, if the Secretary makes such a payment, the Secretary shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty.
(2) Before suit or foreclosure the holder of the obligation shall notify the Secretary of the default, and within thirty days thereafter the Secretary may, at the Secretary's option, pay the holder of the obligation the unpaid balance of the obligation plus accrued interest and receive an assignment of the loan and security. Nothing in this section shall preclude any forebearance for the benefit of the veteran as may be agreed upon by the parties to the loan and approved by the Secretary.
(3) The Secretary may establish the date, not later than the date of judgment and decree of foreclosure or sale, upon which accrual of interest or charges shall cease.
(4)(A) Upon receiving a notice pursuant to paragraph (1) of this subsection, the Secretary shall -
(i) provide the veteran with information and, to the extent

feasible, counseling regarding -
(I) alternatives to foreclosure, as appropriate in light of the veteran`s particular circumstances, including possible methods of curing the default, conveyance of the property to the Secretary by means of a deed in lieu of foreclosure, and the actions authorized by paragraph (2) of this subsection; and
(II) what the Department of Veterans Affairs' and the veteran`s liabilities would be with respect to the loan in the event of foreclosure; and
(ii) advise the veteran regarding the availability of such counseling; except with respect to loans made by a lender which the Secretary has determined has a demonstrated record of consistently providing timely and accurate information to veterans with respect to such matters.

38 U.S.C. § 7252

(a) The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

38 USC Sec. 7261

(a) In any action brought under this chapter, the Court of Veterans Appeals, to the extent necessary to its decision and when presented, shall -
(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

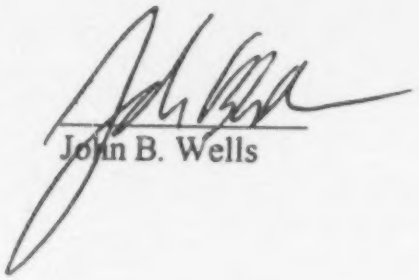
(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;
(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be -
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
(D) without observance of procedure required by law; and
(4) in the case of a finding of material fact made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside such finding if the finding is clearly erroneous.
(b) In making the determinations under subsection (a) of this section, the Court shall take due account of the rule of prejudicial error.
(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.
(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

50 U.S.C. Appx. § 525

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.4(a), I, the undersigned, certify that I have served the Solicitor General of the United States, representing respondent Jesse Brown, Secretary of Veterans Affairs, via first class mail, postage pre-paid, this 29th day of August, 1997.



John B. Wells

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 97-385

In the Supreme Court of the United States

OCTOBER TERM, 1997

JOHN B. WELLS, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a veteran who sold his mortgaged property and allowed the buyers to assume his loan, which the Department of Veterans Affairs (VA) had guaranteed, was entitled to notice of his buyers' default and the VA's payment on the guaranty—which prevents restoration of the veteran's previously used loan-guaranty benefits until repayment of the VA's loss—where the veteran had no right under state law to intervene upon default to prevent the loss.

2. Whether the VA's payment of a guaranty claim upon acceptance of a deed in lieu of foreclosure constitutes a "loss" as that term is used in 38 U.S.C. 3702(b), which provides for the restoration of expended home-loan guaranty benefits.

3. Whether the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501 *et seq.*, proscribes the VA's approval of a mortgage holder's acceptance of a deed in lieu of foreclosure from a defaulting home buyer who had purchased the property from, and assumed the mortgage debt of, a person still on active military duty.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

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JOHN B. WELLS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unreported, but the decision is noted at 114 F.3d 1207 (Table). The opinion of the Court of Veterans Appeals (Pet. App. 8-35) is reported at 9 Vet. App. 293. The opinion of the Board of Veterans Appeals (Pet. App. 36-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1997. The petition for a writ of certiorari was filed on September 2, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) guarantees loans made to veterans[1] by private lenders for, among other things, the purchase of a dwelling to be owned and occupied by the veteran as the veteran's home. 38 U.S.C. 3710(a)(1); *Rank* v. *Nimmo*, 677 F.2d 692, 694 (9th Cir.), cert. denied, 459 U.S. 907 (1982). "[T]he [VA's] guaranty * * * operate[s] as the substantial equivalent of a down-payment * * * by the veteran * * * in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

The guaranty on a particular loan may not exceed the guaranty entitlement available to the veteran. 38 U.S.C. 3703(a)(1)(A)(ii). The statute gives eligible veterans an initial, total loan guaranty entitlement of $36,000 for loans up to $144,000, and $50,750 for loans exceeding that amount. 38 U.S.C. 3703(a)(1)(B). That initial entitlement is reduced by the amount of benefits previously used by the veteran, unless they have been restored pursuant to 38 U.S.C. 3702(b). *Ibid.*

Section 3702(b) provides, in relevant part, that in computing the amount of previously used loan benefits to be deducted from a veteran's total remaining entitlement,

> the Secretary may exclude the amount of guaranty * * * housing loan entitlement used for any guaranteed * * * loan under the following circumstances:

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[1] The term "veteran" includes individuals serving on active duty in the armed services. 38 U.S.C. 3701(b)(4).

> (1)(A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and
>
> (B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, *or if the Secretary has suffered a loss on such loan, the loss has been paid in full.*
>
> (2) A veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use of the veteran-transferee's entitlement, to the extent that the entitlement of the veteran-transferor had been used originally, in place of the veteran-transferor's for the guaranteed * * * loan, and the veteran-transferee otherwise meets the requirements of this chapter.

38 U.S.C. 3702(b) (emphasis added). Thus, if the veteran has disposed of the property, but the VA has suffered a loss on the loan, the statute does not authorize the Secretary to restore the loan guaranty amount until the loss is repaid.[2] The statute further

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[2] The corresponding regulation similarly provides that the Secretary may exclude the amount of guaranty * * * entitlement used for any guaranteed * * * loan provided:

> (1) The property which served as security for the loan has been disposed of by the veteran, or has been destroyed by fire or other natural hazard; and
>
> (2)(i) The loan has been repaid in full or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on said loan, such loss has been paid in full;
>
> * * * * *

38 C.F.R. 36.4302(j).

provides, however, that the "Secretary may, in any case involving circumstances the Secretary deems appropriate, waive one or more of the conditions prescribed in paragraph (1). 38 U.S.C. 3702(b).

2. In 1978, petitioner, then on active duty in the Navy, purchased a home in Chesapeake, Ohio, financed by a $58,500 loan. The VA guaranteed 29.91% of that loan, up to $17,500. As a result, petitioner's VA loan guaranty entitlement was reduced by $17,500. Pet. App. 2-4, 26.

In 1979, petitioner sold the property to Roy G. Osborn and Shirley D. Stamper, who assumed the outstanding guaranteed loan. Pet. App. 9, 26. Osborn apparently was a veteran, but he did not substitute any VA loan guaranty entitlement he may have had for petitioner's loan guaranty entitlement, as allowed by 38 U.S.C. 3702(b)(2). *Id.* at 26. In July 1981, Osborn and Stamper defaulted on the loan. Shortly thereafter, they offered to tender a deed in lieu of foreclosure to the loan holder, First Family Mortgage Corporation. *Id.* at 3.

In February 1982, the VA notified First Family that the VA had approved First Family's acceptance of a deed in lieu of foreclosure, in exchange for First Family's release of the borrower from all personal liability on the note. Pet App. 3; Rec. Doc. No. 32.[3] As provided by statute and regulation, the VA set a "net value" of the property (fair market value less certain costs the VA expected to incur) to be credited against the outstanding debt. 38 U.S.C. 3732(c)(1)(C); 38 C.F.R. 36.4320(c). The net value of the property was set at $58,620, and First Family subsequently deeded

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[3] "Rec. Doc." refers to documents in the Designation of Record filed in the court of appeals.

the property to the VA for that value. Rec. Doc. No. 27. In February 1983, the VA notified First Family that it had approved the payment of a guaranty claim to First Family in the amount of $5,539.67. Pet. App. 3.

There is now a regulatory requirement that the loan holder notify the "original veteran-borrower" when it notifies the VA of its intention to foreclose. 38 C.F.R. 36.4317(c). No such regulation existed, however, during the period of the transactions at issue in this case. Pet. App. 20. Petitioner claims that he had no notice or knowledge of the default by Osborn and Stamper, or the tender and acceptance of the deed in lieu of foreclosure, or the VA's payment of the $5,539.67 guaranty claim. Petitioner learned of those events when he was informed that the VA would not restore the $17,500 of loan guaranty entitlement he used to obtain the 1978 loan until the VA's $5,539.67 loss on that loan had been repaid. Pet. App. 3-4. See 38 U.S.C. 3702(b).[4]

3. Petitioner objected to the VA's decision not to restore the $17,500 of his loan guaranty benefits that he had previously used, and he appealed to the Board of Veterans Appeals, which denied his request. Pet. App. 36-43. Petitioner then appealed to the Court of Veterans Appeals, which affirmed. *Id.* at 8-35. The Court of Veterans Appeals held that petitioner did not have a property interest in the restoration of his expended loan guaranty entitlement, *id.* at 21-28, or a state-law equitable right of redemption of the real property for which the deed in lieu of foreclosure had been tendered, *id.* at 28-33. Accordingly, the court

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[4] Petitioner may, however, use the remainder of his VA loan guaranty entitlement.

concluded he was not entitled to advance notice of the tender and acceptance of the deed in lieu of foreclosure. *Id.* at 9. Finally, the court rejected petitioner's contention that the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501 *et seq.*, barred the VA from approving First Family's acceptance of the deed in lieu of foreclosure while he was on active duty. Pet. App. 33.

4. The Court of Appeals for the Federal Circuit affirmed, Pet. App. 1-7, holding that petitioner had "neither demonstrated that he retained a property interest in the restoration of his expended VA home loan guaranty entitlement nor retained an equitable right of redemption." *Id.* at 2. After identifying the statutory conditions for restoration of previously used VA home loan guaranty benefits, the court of appeals found that once petitioner "utilized his original guaranty benefits, he had a mere unilateral expectation of repaying his loan, and thus, according to the terms of § 3702(b), had a mere unilateral expectation of restoring his full guaranty benefits." *Id.* at 6. Relying upon *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the court held that petitioner "had no legitimate claim of entitlement grounded in the statute defining eligibility for the restoration of his full VA home loan guaranty." Pet. App. 6. The court further determined that because petitioner "did not retain an equitable right of redemption after he sold his home to Osborn," there was no need to "consider whether such an interest is a property interest protected by the due process clause of the Constitution." *Id.* at 7.

ARGUMENT

Petitioner contends that the VA had a duty to notify him of his buyers' default, so that he could act to cure that default and prevent its effect on the eventual restoration of his expended loan guaranty benefits. Petitioner argues that, without such notice, his due process rights were violated by the VA's insistence that the amount it paid to First Family as a result of the default on the loan must be reimbursed before petitioner's used benefits could be restored. The court of appeals correctly rejected that argument. The unpublished decision of the court below conflicts with no decision of this Court or of any other court of appeals, and it presents no issue of continuing importance in light of the VA regulation that now provides for the private lender to notify the veteran before foreclosing on a guaranteed loan that has been assumed by a subsequent purchaser. See page 5, *supra*. Petitioner's claim therefore warrants no further review.

1. a. The court of appeals found that petitioner had no constitutionally protected property interest in the restoration of his benefits. This Court need not reach that question, however, because even if petitioner did have such an interest, he received any process due to protect it.[5] To the extent petitioner had a property

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[5] The court of appeals' conclusion that petitioner had no protectible property interest in eligibility for restoration of full VA loan benefits is, however, consistent with this Court's precedents. To possess a Fifth Amendment property interest in an economic benefit, an individual "must have more than an abstract need or desire for it * * * [or] a unilateral expectation of it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). A statute or regulation creates a constitutionally protected property interest in benefits only if it places "substantive

interest in the future restoration of his previously used loan guaranty benefits, the options available for protecting that interest at the time he sold the property provided all the process constitutionally due.

There were several ways in which petitioner could have protected the restoration of his guaranty benefits. Under 38 U.S.C. 3702(b)(2), used benefits may be restored when the property is transferred if "[a] veteran-transferee has agreed to assume the outstanding balance on the loan and consented to the use

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limitations on official discretion" in awarding those benefits. *Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983). Restoration of petitioner's expended loan guaranty amount is controlled by 38 U.S.C. 3702(b) and 38 C.F.R. 36.4302(j). Those sections provide only that, if certain criteria are met, "the Secretary *may* exclude the ~~amount~~ of guaranty" used for that loan when deducting used benefits from the veteran's total entitlement (emphasis added). Moreover, the waiver clause in 38 U.S.C. 3702(b) grants discretionary authority to restore benefits where the conditions have not been met. Thus the statute and regulations do not on their face limit administrative discretion so as to create a property interest in benefit restoration. The VA informs us that, in practice, whenever the criteria listed in those sections are met, the Secretary restores the veteran's original entitlement. This Court has indicated that in the state employment context, "policies and practices" might in some circumstances give rise to a constitutionally protected property interest, where an employee had come to rely on such an understanding. *Perry* v. *Sindermann*, 408 U.S. 593, 603 (1972). That rationale has not been extended to other contexts, see, *e.g.*, *Washington Legal Clinic for the Homeless* v. *Barry*, 107 F.3d 32, 38 (D.C. Cir. 1997) (noting that, outside the employment context, no federal circuit court has held that administrative understandings, wholly apart from legislation or regulations, may create a constitutionalized property interest); compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1011 (1984), and petitioner in any event does not claim that he relied on any such policy or practice.

of the veteran-transferee's entitlement, to the extent that the entitlement of the veteran-transferor had been used originally * * * for the guaranteed * * * loan." One of petitioner's buyers, Osborn, apparently was a veteran. Pet. App. 10. Assuming Osborn retained sufficient VA loan guaranty entitlement, petitioner could have made the sale of the property contingent upon Osborn's substituting his own eligibility for the VA loan guaranty, thus allowing immediate restoration of petitioner's original benefits. As the Court of Veterans Appeals noted, however, petitioner "did not take any steps to ensure that Mr. Osborn would substitute his eligibility" for the loan guaranty. *Id.* at 26.

If the buyers were not in a position to substitute their own loan guaranty entitlement for petitioner's, there were other ways in which petitioner could have protected any future interest in having his original benefits restored. Rather than allowing the buyers to assume the mortgage, he could have required them to obtain their own financing and pay off the VA-guaranteed mortgage at the time of the sale. Under 38 U.S.C. 3702(b)(3)(A), that arrangement would have allowed restoration of petitioner's used loan guaranty benefits as soon as he transferred the property. Even if petitioner's buyers assumed primary responsibility for his mortgage, he could have structured the conveyance to ensure that he would at least have an opportunity, upon their default, to regain possession of the property and control of the debt. For example, he might have reserved a right to notice and first refusal on sale of the land. Petitioner chose instead to deed away his entire property interest, have the buyers assume the mortgage, and let the chips fall where they may.

In short, by allowing his 30-year loan to be assumed—without substituting the purchaser's VA loan guaranty entitlement for his own, maintaining any interest in the property, or requiring either the buyers or First Family to notify him in the event of a default—petitioner accepted the risk that his buyers' actions would determine the future restoration of his original loan benefits.[6] Under these circumstances, the VA was not constitutionally required to keep petitioner apprised of how his buyers' handling of his debt affected the potential future restoration of the benefits he had used to guarantee that debt.

b. The decision below does not conflict with decisions cited by petitioner that have required notice of foreclosure before allowing the VA to pursue a veteran for a loss caused by the default of a home buyer who assumed the veteran's mortgage. See *Vail* v. *Derwinski*, 946 F.2d 589 (8th Cir. 1991); *United States* v. *Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985); *United States* v. *Murdock*, 627 F. Supp. 272 (N.D. Ind. 1985). The courts in those cases held that the VA could not proceed against the veteran to recoup a deficiency from a foreclosure sale, when the VA had not attempted to notify the veteran of the default and foreclosure that led to the loss. Here, however, the VA is not trying to collect a debt from petitioner. It is one thing to hold that the VA may not withhold veterans' disability checks to make up deficiencies arising from foreclosures of which the veterans had

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[6] Even if the buyers had made all of the mortgage payments on time, the loan would not have been paid off (thereby making restoration possible) until October 1, 2008. Pet. App. 27. If the buyers had been late with payments, or renegotiated the time frame of the loan, restoration of petitioner's benefits would have been further delayed.

no notice. See *Vail*, 946 F.2d at 594. It would be an entirely different matter to hold that a veteran has a right to automatic restoration of his depleted loan benefits because he was not notified of his purchasers' default.[7]

2. The court of appeals also examined Ohio law and concluded that petitioner had no right of redemption under state law that could, in turn, furnish the basis for a claim that the VA had a duty to notify him of the buyers' default. Pet. App. 6-7. Even if petitioner had retained a state-law right that would have allowed him to intervene in the conveyance of the deed in lieu of foreclosure and to redeem the property, it by no means follows that the VA, rather than the mortgagee (First Family), would have had the duty to notify petitioner. And it is far from clear that the VA's failure to notify petitioner of his opportunity to exercise any rights he might have had under *state* law would trigger a right in petitioner to restoration of his loan guaranty entitlement under *federal* law. In any case, the court below correctly found that petitioner retained no "equity of redemption" under state law—*i.e.*, that he had no right to redeem the property

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[7] The one other court of appeals to interpret the statutory section governing restoration of benefits also drew a line between a veteran's right to avoid a debt owed to the VA as a result of a loan default and his right to restoration of benefits. See *Dixon* v. *United States*, 68 F.3d 1253, 1257 (10th Cir. 1995), cert. denied, 116 S.Ct. 1566 (1996). In *Dixon*, a veteran whose debt to the VA was discharged in bankruptcy argued that his full original loan guaranty entitlement should be restored as a result. The court rejected that contention, holding that the veteran was "simply not eligible for the full amount of guaranty benefits until the loss incurred by the VA is repaid." *Ibid.*

by paying the debt upon his purchasers' default. *Id.* at 7.

Under Ohio law, a mortgagor who sells his entire interest in real property, as petitioner did when he conveyed the property by warranty deed and his purchasers assumed the mortgage, passes his equity of redemption to his buyers. See *Carter* v. *Walker*, 2 Ohio St. 339 (1853) (where grantee by deed had agreed to pay off mortgage, he held equity of redemption; grantor had no remaining interest in land and would not be necessary party to foreclosure sale); see also 69 Ohio Jur. 3d *Mortgages* § 251, at p. 303 (1986); *Hembree* v. *Mid-America Federal Sav. & Loan Ass'n.*, 580 N.E.2d 1103, 1111 (Ohio Ct. App. 1989) ("A vendee in a contract of sale acquires his vendor's equity of redemption and has the right to redeem the mortgaged premises."). When petitioner sold the property, his equity of redemption was acquired by his buyers; he had no right to intervene in their conveyance to the mortgage holder of the deed in lieu of foreclosure.[8]

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[8] To be sure, after he sold the property, petitioner remained liable on the mortgage note as a surety. *Walser* v. *Farmers' Trust Co.*, 185 N.E. 535, 538 (Ohio 1933) ("[W]here the grantee of a parcel of real estate, as part of the purchase price thereof, assumes to pay a debt secured thereon by a mortgage—the grantor being also personally bound for the payment—such assumption, as between the grantor and grantee, constitutes the grantee the principal debtor, and the grantor his surety.") When First Family accepted the deed in lieu of foreclosure, however, it released petitioner from any personal liability on the mortgage note, although it retained the right to file a claim with the VA under the guaranty. Rec. Docs. 26, 32; Pet. App. 10-11. Petitioner has cited no authority for the proposition that his rights of indemnity and subrogation as a surety would have entitled him to prevent a conveyance

Here the owners of a fee simple interest in real property voluntarily deeded the property to the private mortgage holder (First Family). Although the VA, as partial guarantor of the loan, authorized First Family to accept the deed in lieu of foreclosure, that authorization did not give the VA a duty to notify petitioner of his buyers' default. Moreover, since petitioner had no state-law right of redemption, even if he had received notice of the default, he would have had no legal right to intervene in the conveyance of the deed in lieu of foreclosure.[9]

3. Petitioner contends, however, that in conditioning restoration of full loan benefits—after "the Secretary has suffered a loss" on a loan—on full repayment of the loss, see 38 U.S.C. 3702(b)(1)(B), Congress did not intend to include payment of a guaranty claim after authorizing acceptance of a deed in lieu of foreclosure. He argues first that the term "loss," as used in the statute, should be narrowly defined as "[d]estruction through natural disasters," and should not include a financial loss on a loan guaranty. Pet. 9. That contention finds no support in the cases petitioner cites, which define "loss" in contexts other than a loan, a loan guaranty, or a similar financial transaction.[10] In fact, a Senate Report addressing VA

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that released him from all the liability of suretyship. See Pet. 4. In any event, the court below found no such right.

[9] Petitioner has raised no claim of any right to notification of the VA's subsequent sale of the property, which First Family conveyed to it after taking the deed. No statutory section, regulation or administrative practice provides for such notification.

[10] *Sitzman* v. *National Life & Accident Ins. Co.*, 182 N.E.2d 448 (Ind. App. 1962), concerned whether an insured under a life insurance policy providing benefits for the

loan benefits uses the term "loss" in the context of foreclosure: "[I]f the prior loan was foreclosed and the VA paid the claim, the veteran must repay in full any loss suffered by the VA on such loan." S. Rep. No. 1334, 93d Cong., 2d Sess. 21 (1974).

Petitioner next contends that the guaranty claim paid after the conveyance of the deed in lieu of foreclosure was not a loss because the VA "was in complete control of the situation" and made its decision "with full knowledge that a deficiency would result." Pet. 11. The VA, however, did not cause, encourage, or otherwise contribute to the default on the loan. Authorizing First Family to accept the deed was no more a self-inflicted wound than was authorizing foreclosure. In fact, acceptance of a voluntary deed may have mitigated the VA's loss.[11] In either

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accidental "loss of eyesight" may collect such benefits for loss of sight in one eye only. *Littrell* v. *Allemannia Fire Ins. Co.*, 226 N.Y.S. 243 (App. Div. 1928), addressed whether an appraisal was required before collecting under a fire insurance policy for property that was totally lost rather than merely damaged. *Providence Journal Co.* v. *Broderick*, 104 F.2d 614 (1st Cir. 1939), held that a taxpayer suffered no deductible loss for income tax purposes from the voluntary demolition of a building. None of those cases suggests that the amount paid by the VA on First Family's claim does not constitute a "loss" to the VA.

[11] Both the General Accounting Office and the VA Inspector General audited the VA home loan program in the mid-1980s and concluded that the VA should encourage the use of deeds in lieu of foreclosure as a cost-saving measure. The Inspector General estimated that in Fiscal Year 1985 the VA, through more aggressive action, could have accepted approximately 4800 additional voluntary deeds, saving the taxpayers about $16.2 million. S. Rep. No. 204, 100th Cong., 1st Sess. 32 (1987).

event, the VA was obligated to make First Family whole within the limits of the guaranty.

4. Finally, petitioner argues (Pet. 12-13) that the transfer of the deed in lieu of foreclosure while he was on active duty violated the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 501 *et seq.* That Act suspends various civil liabilities of persons in military service. Petitioner relies mainly upon Section 525, which provides that the "period of military service shall not be included in computing any period * * * provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment." Petitioner's invocation of Section 525 depends upon his argument that he had a right to redeem the property at the time the deed was conveyed in lieu of foreclosure. The court of appeals correctly ruled, however, that, under Ohio property law, petitioner had no right of redemption. Petitioner's claim under the Soldiers' and Sailors' Civil Relief Act thus adds nothing to the case and does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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